

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
March 18, 2008 Session

**STATE OF TENNESSEE v. NORMAN LONIE FLESCHMAN**

**Direct Appeal from the Circuit Court for Williamson County  
No. I-CR-112233     Robbie T. Beal, Judge**

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**No. M2007-01161-CCA-R3-CD - Filed December 8, 2008**

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The defendant, Norman Louis Fleschman,<sup>1</sup> pled guilty in the Williamson County Circuit Court to two counts of sexual activity or simulated sexual activity involving a minor, Class E felonies, and one count of solicitation of a minor, a Class C felony. The plea agreement provided that the sentences imposed by the trial court were to be served concurrently but left all other sentencing determinations to the trial court, including a determination of the defendant's eligibility for judicial diversion. Following a sentencing hearing, the trial court sentenced the defendant to one year for each Class E felony conviction and to three years for the Class C felony conviction. The court further found that the defendant was not a proper candidate for judicial diversion or probation and ordered that the sentences be served in confinement in the Tennessee Department of Correction. On appeal, the defendant contends that the trial court erred: (1) by denying judicial diversion; and (2) by denying probation because the crime "should not be probatable." Upon review of the record, we conclude that the trial court incorrectly based its denial of judicial diversion and probation on the belief that an offender convicted of the offenses for which the defendant was convicted should not be eligible for judicial diversion and probation based upon the nature of the crimes themselves. Nonetheless, upon *de novo* review, we conclude that the defendant, though eligible for diversion, has failed to establish his suitability. However, review of the record reveals that the defendant has established his suitability for a sentence of split confinement. Accordingly, the trial court's denial of diversion is affirmed; the court's denial of probation is reversed; and the sentence is modified to a sentence of six months confinement followed by probation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed  
in Part, Reversed in Part and Modified**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

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<sup>1</sup>We note that alternate spellings of the defendant's name appear in the record. The defendant was indicted under the name Norman Lonie Fleschman, and the judgments of conviction also bear that name. However, elsewhere in the record, his name is spelled Fleischman, which the defendant testified was the correct spelling. Nothing indicates, however, that the spelling was amended in the style of the case.

Richard Tennent, Nashville, Tennessee, for the appellant, Norman Lonie Fleschman.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Ronald L. Davis, District Attorney General; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

### **Factual Background**

The relevant facts of the case, as recited in the prosecuting attorney's denial of pretrial diversion letter, are as follows:

On May 30, 2006, the defendant made internet contact with an undercover officer with the Internet Crimes Against Children Task Force (ICAC) who was posing as a 13 year old female. The officer's Yahoo! Profile listed a real name of Jessica, age 13. The defendant asked "r u really 13"? The officer replied, "Yea" [sic]. Thirteen lines into the chat, the defendant asked for a picture of the minor child. Then proceeded to ask if she has "a cam", (i.e. web-camera). The officer ended the chat soon thereafter.

On June 7, 2006, the defendant made contact with the same internet persona of the same ICAC detective. The defendant began the chat again by asking "so r u really 13" and then asked "can I see u?" Again the defendant asked for pictures early in the chat session. After receiving pictures of a young girl and a woman identified as the child's mother and 18 minutes into the chat, the defendant asked to meet the 13 year old. The defendant went so far as to suggest leaving Franklin with the child, stating "we can go out of franklin area all together." When the undercover officer asked, "do u care about my age", the defendant said no. The defendant was aware that his behavior may have legal consequences and asked the child "so r u going to turn me in to the cops or something or do u like to meet". The defendant confirmed that he wanted to meet the child, but told her it would have to be after he returned to the area. He suggested Friday afternoon.

Further in the chat session, the defendant offered to send the child a nude picture of himself. The defendant sent two pictures of his penis. The defendant even encouraged the child to masturbate to the photos, stating, "what r u doing as u look at them". After receiving a reply of "nothing", the defendant stated, "o I thought u may be touching urself". The defendant then brings up that fact that he has a web-cam and asked the child if she wanted to see anything. The defendant pointed out that he did not "want to je[o]pordize us meeting".

As the chat continued, the defendant asked the child what he would be able to do to her. The defendant asked to meet her on a specific day and planned how they would make contact. The defendant gave her his telephone number. Then the defendant asked if she would like to see more of him. Using his we[b]-cam, the defendant masturbated for what he believed to be a 13 year old girl. During the masturbation session, the defendant asked the child if she would do that to him, would she like him to teach her and would she touch his penis. The defendant gave the child his telephone number again so they could meet.

When the undercover detective contacted the defendant and informed him he was being investigated for attempting to meet a 13 year old girl for sex and that he had masturbated for her via web-cam, the defendant denied what he had done and stated it was a mistake. When the detective had to confront the defendant with the fact that he was the 13 year old girl, the defendant said, "I see." The defendant turned himself in and surrendered his laptop to law enforcement.

The defendant was indicted by a Williamson County grand jury on two counts of sexual activity or simulated sexual activity involving a minor and one count solicitation of a minor. He subsequently pled guilty as charged, with the agreement specifying that the sentences would be served concurrently and that the court would consider the defendant's eligibility for judicial diversion. Detective Warner, who portrayed the thirteen-year-old girl, testified at the sentencing hearing regarding the circumstances of the offenses.

Evidence presented at the sentencing hearing established that the defendant was a fifty-two-year-old father of two children, who was employed at the time of the offenses as a traveling salesman for Pergo Flooring and at the time of the hearing at Macy's. The defendant had no prior criminal convictions, though he did acknowledge addictions to both alcohol and heroin. He further testified that he began using his laptop computer for on-line chats to deal with his loneliness on the road while he was traveling with his job. He stated that he engaged in these conversations, which eventually progressed to sexual fantasy chats, with adult women. The defendant acknowledged that he engaged in a chat with the "victim" in this case, whom he believed to be a thirteen-year-old girl. He further stated that he recognized that his behavior was unacceptable and that it was escalating. According to the defendant, he was thankful he had been caught and viewed it as "God's way of stopping me, so I can get help."

The Psycho-Sexual Evaluation completed at Vanderbilt University was also admitted into evidence. According to the report, the defendant was low-risk for re-offending and was amenable to sex-offender treatment.

Testimony was presented regarding the defendant's history of alcohol and drug abuse. According to the defendant, an acknowledged drug and alcohol addict, he began using alcohol at age thirteen and eventually escalated to heroin. When the defendant was in his mid-thirties, he checked himself into a thirty-day inpatient rehabilitation center and, after completing the program, began

attending Narcotics Anonymous. He testified that he remained sober for seven years, but that he subsequently used heroin on one occasion. Afterwards, he remained sober for the following thirteen years. Robert Hill, the defendant's sponsor, testified regarding the work the defendant had done in his program in assisting other addicts. Two character letters were introduced, one from a recovering addict who wrote how the defendant had helped him overcome his addiction. Hill stated that he believed that the defendant would be successful in sex offender treatment and that he had no concerns about the defendant remaining in the community. The defendant's ex-wife also testified that she believed the defendant would be successful in treatment and stated that, despite their divorce, she believed he was a good man.

After hearing the evidence presented, the trial court imposed one-year sentences for the two sexual activity or simulated sexual activity involving a minor convictions and a three-year sentence for the solicitation of a minor conviction, all to be served concurrently, for an effective sentence of three years. The court then denied the defendant's request for judicial diversion and for probation, and the court ordered that the sentences be served in the Department of Correction. The defendant timely appealed that decision.

### **Analysis**

On appeal, the defendant has raised two issues for our review: (1) whether the trial court erred in denying the defendant judicial diversion; and (2) whether the court erred in denying the defendant probation.

#### **I. Judicial Diversion**

The defendant first contends that the trial court abused its discretion in denying him judicial diversion. Specifically, he contends that the court erred in its decision to deny diversion by focusing on facts which related entirely to the essential elements of the offense.

“Judicial diversion is legislative largess whereby a defendant adjudicated guilty may, upon successful completion of a diversion program, receive an expungement from all ‘official records’ any recordation relating to ‘arrest, indictment or information, trial, finding of guilty, and dismissal and discharge’ pursuant to the diversion statute.” *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). The effect of discharge and dismissal under the diversion statute “is to restore the person . . . to the status the person occupied before such arrest or indictment or information.” *Id.* (citing T.C.A. § 40-35-313(b)). Thus, a person granted judicial diversion, and who successfully completes the program, is not convicted of an offense because a judgment of guilt is never entered. *See* T.C.A. § 40-35-313(b) (2006).

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. T.C.A. § 40-35-313(a)(1)(B)(i)(b)-(c). However, eligibility under the diversion statute does not ensure the grant of diversion. Indeed, the decision of whether to place a defendant

on judicial diversion is within the sound discretion of the trial court. *State v. Harris*, 953 S.W.2d 701, 705 (Tenn. Crim. App. 1996). An abuse of discretion exists if the record contains no substantial evidence to support the denial. *State v. Hammersley*, 650 S.W.2d 352, 356 (Tenn. 1983); *State v. Bonestel*, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000).

In determining whether to grant judicial diversion, the trial court must consider: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). The trial court should also consider whether judicial diversion will serve the ends of justice - - the interests of the public as well as the accused. *State v. Lewis*, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). Additional factors which may be considered include the defendant's attitude, his behavior since arrest, his home environment, current drug usage, emotional stability, past employment, general reputation, family responsibilities, and the attitude of law enforcement. *Id.* In addition, "the record must reflect that the court has weighed all of the factors in reaching its determination." *Electroplating, Inc.*, 990 S.W.2d at 229. If the trial court refuses to grant judicial diversion, it should state in the record "the specific reasons for its determinations." *State v. Parker*, 932 S.W.2d 945, 958-59 (Tenn. Crim. App. 1996). If the trial court "based its determination on only some of the factors, it must explain why these factors outweigh the others." *Electroplating, Inc.*, 990 S.W.2d at 229. We also note that "Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion." *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997).

In denying diversion the trial court made the following extensive findings of fact:

Your lawyer has done an outstanding job representing you. The fact is [ ] that I don't recall being asked ever to grant a diversion for this type of offense or similar offense. And when I first saw the application, I doubted very seriously if, you know, anyone could make the argument for diversion with regard to your offense. Your lawyer has certainly made the argument for diversion.

However, to grant you diversion, I just don't think is appropriate or correct. I think judicial diversion, while this Court believes in judicial diversion and while this Court is very quick to give judicial diversion in some cases, nonviolent offenses especially as it relates to younger people, in your particular case, the Court is just not comfortable with diversion and I'm now going to run through the reasons as to why.

With regard to your amenability to correction, I think you meet that requirement. I think probation would be successful for you. I think you've shown proof that through your Narcotics Anonymous meetings that you can put yourself in

a position where you can attempt to correct your own behavior. And I think you actually meet that criteria.

As to the second for judicial diversion, however, the circumstances of the offense. The circumstances of the offense are shocking. They're egregious. And with all due respect to your attorney, he did point out that there are others that have done much worse. But that doesn't lessen the significance of your particular crime.

One of the things that, quite frankly, the Court has had a hard time shaking is an exhibit that no one paid much attention to and it was the pictures of that 13-year-old child that Detective Warner purported to be.

The fact is [ ] that in your mind, you thought that child was real. And you took something away from that child that, had that child been real, she would have never gotten back. And you would have taken away that child's innocence. And even though you may not have done it with her in the room, even though you may not have met the child later, even though you may never have talked to the child again, for that one instance, for that one instance, you took something from that child that the child can never get back. And the circumstances of the offense, just simply do not lend themselves to diversion.

Your attorney made the point that that's why the legislature created diversion was for people similar situated to you, no criminal record and such. And, again, respectfully, I disagree with your lawyer. The legislature has made it clear and with regard to these kind of cases, they want to be able to keep up with the offender and they want to be able to keep up with the offender for as long as they possibly can. And I think that is at odds with their position as regards to judicial diversion. It's always up to the court to decide whether diversion is appropriate. In this particular case, that is a main factor as to why diversion is not appropriate in your case.

The Court also would be concerned that had that child not been 2½ hours away, but had that child been in the next room, had it been an actual child, there would have been a lot more than just inappropriate pictures being sent through the internet, there would have been an actual act.

With regard to your criminal record, you have no criminal record. With regard to your social history, I agree with your attorney 100 percent. I think your social history probably is appropriate for diversion to be granted. I think, in fact, you have helped people in your past. You've raised two children of your own. The Court has got no reason to believe that you failed in any way of doing that. Your social history probably allow -- would allow this Court to grant diversion.

The status of your physical and mental health. Obviously, your mental health is at issue here. Again, going back to the report from Vanderbilt, I believe that I will defer to the doctors in that report and say that you could -- that you would be amenable to treatment just like you've shown a history of being amenable to treatment with your other addictive issues. The difference is and what concerns the Court in this case and, quite frankly, I'm probably getting ahead of myself. I'll touch on this again. But what concerns the Court in this case, if you relapse with drugs and alcohol, you hurt yourself. And relapses, you know much more than I, are a normal part of the recovery process. You don't want them to happen, but, quiet frankly, I don't remember too many cases where an actual addict has not relapsed. When we're dealing with alcohol and narcotics, you hurt yourself. When we're dealing with this type of crime, if you relapse one time, just like you relapse with your alcohol and drugs, if you relapse one time, one time, then you impact another young person for the rest of their life, and the Court simply cannot take that risk that you're going to relapse.

I agree with the doctors. You're probably amenable to treatment. And in the long term, I think treatment would probably be successful. But the threat of relapse in this particular case is so great that the Court simply doesn't believe diversion is appropriate. And your mental health history while[ it's] sound and while [it's] good, your mental health history because of the nature of the crime, doesn't lend itself to diversion.

The deterrence value to the accused as well as others. Again, we'll talk about this very briefly here in a moment. I find you to be a sympathetic figure. I don't understand the nature of the act that you committed. I dare say you do not understand the nature of the act you committed. I dare say that you do not understand the desire that motivates you to solicit a 13-year-old child. You know it's wrong. You feel guilty about it when you're doing it, you feel guilty about it after it's over and you're embarrassed and you have every right to be embarrassed. I'm embarrassed for you. You had a good life and you have suffered immensely. But a message does need to go out to the community that says, I don't care how great of a citizen you are. I don't care what type of person you are, leader of the church or leader of, you know, a community leader or leader of industry or whoever, coached little league and great guy, I think a message needs to go out to the community that if you engage in this type of activity with a specific intent to harm a child, regardless of who you are and how great you have been, you will be punished for it and it will remain with you as a stigma, perhaps, for the rest of your life. That's a consequence and it is a severe consequence, but it is something that I believe is required.

Whether judicial diversion wi[ll] serve the interest of the public as well as the accused. Obviously, I think I've already gone over that one. I don't believe judicial

diversion will serve the interest of the public. It may well serve the interest of the accused, but I think that's secondary to the public itself.

On appeal, the defendant contends that the trial court denied him diversion using "a logic that has been specifically condemned by this court and the Tennessee Supreme Court - a logic that a certain category of crime should never be eligible for diversion." The defendant is correct that blanket denials of diversion based upon the offense committed have been rejected as improper. *State v. McKim*, 215 S.W.3d 781, 788 (Tenn. 2007) (holding denial of pretrial diversion was error when prosecutor suggested that he would not grant pretrial diversion to *any* defendant charged with criminally negligent homicide regardless of the defendant's personal circumstances and amenability to correction); *Hammersley*, 650 S.W.2d at 356 (blanket policy of refusing pretrial diversion in cases where the defendant was charged with a "serious" crime was inappropriate, as the prosecutor was undertaking to apply a local policy contrary to or different from that provided for by the state legislature); *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997) (trial court committed an abuse of discretion in its denial of judicial diversion by failing to consider the personal characteristics of the defendant but, rather, basing the denial solely on its view that perjury was not an appropriate crime for diversion). It is not disputed that a denial of diversion, based solely on the type of the crime itself, is forbidden by Tennessee case law. *Hammersley*, 650 S.W.2d at 356-57.

We agree that, contrary to this established precedent, the trial court in this case focused on its apparent opinion that the crimes for which the defendant was convicted should not be divertible offenses. It is not disputed in this case that the trial court considered each of the required seven factors in reaching its determination to deny diversion. However, each of the factors that the court found to weigh against a grant of diversion appears to have been based upon the type of the crimes, an improper consideration. It has been held that not only must the court consider all relevant factors in making its determination of whether to grant diversion, but the court "must avoid relying upon irrelevant factors in denying diversion as well." *McKim*, 215 S.W.3d at 787 (emphasis omitted) (referring to the duty of a prosecutor in considering pretrial diversion). The determination that an offense should not be a divertible offense has been held to be such an irrelevant factor. *Id.*

The court in this case found that the factors of the amenability to correction, the defendant's criminal record, the defendant's social history, and the defendant's physical health all weighed in favor of a grant of diversion. Though not specifically so stating, a reading of the court's extensive findings suggests that the factors found to weigh against a grant of diversion were based upon the court's belief that the crimes for which the defendant stood convicted should not have been divertible. Prior to its consideration of the required factors, the court specifically noted that it "doubted very seriously if, you know, anyone could make the argument for diversion with regard to your offense." In considering the circumstances of the offense, the court considered the facts of the defendant's particular case and found them egregious, but then the court proceeded to note that the "legislature has made it clear and with regard to these kind of cases, they want to be able to keep up with the offender and they want to be able to keep up with the offender for as long as they possibly can. And I think that is at odds with their position as regards to judicial diversion." In considering the defendant's mental health, the court stated, "[a]nd your mental health history while [it's] sound

and while [it's] good, your mental health history because of the nature of the crime, doesn't lend itself to diversion," thus indicating that anyone convicted of these crimes would have poor mental health simply based upon commission of the crime. With regard to the deterrence value and the interest of the public, the court commented that "I don't care how great of a citizen you are . . . I think a message needs to go out to the community that if you engage in this type of activity with a specific intent to harm a child, *regardless off who you are and how great you have been*, you will be punished for it and it will remain with you as a stigma, perhaps, for the rest of your life." (Emphasis added). Moreover, in denying the defendant probation, the court stated that "the offense should not be probatable in your case or, quite frankly, any others and that is the message that needs to be sent."

These comments clearly indicate that the court was of the opinion that the crimes themselves should preclude anyone who stands convicted of those crimes from being granted judicial diversion. The tone of the comments suggests that the court, despite references made to the facts of the defendant's particular case, suggests that it will not grant diversion to *any* defendant charged with these crimes, regardless of the defendant's personal circumstances and amenability to correction. However, the statutory provisions governing judicial diversion do not exclude defendants convicted of these crimes from consideration. *See* T.C.A. § 40-35-313.

Thus, we must conclude that the trial court abused its discretion and erred in its basis for denying the defendant's request for judicial diversion. Thus, we must conclude that the trial court erred in its basis for denying the defendant's request for diversion. Nonetheless, we will discern substantial evidence supporting the denial of diversion. *Electroplating*, 990 S.W.2d at 229.

We must agree with the defendant that he has presented several positive factors which weigh in favor of a grant of diversion. It is undisputed that the defendant has no prior criminal convictions, expressed remorse for his actions, overcame an addiction to illegal drugs, assisted other addicts in their recovery, maintained consistent employment, and raised two children. Moreover, there is strong evidence presented that he is amenable to correction in the Psycho-Sexual Evaluation, which specifically found that he was a low risk to re-offend. Nonetheless, we cannot conclude that these positive factors presented outweigh the negative and conclude that the ends of justice do not require a grant of diversion in this case.

We agree with the trial court that the circumstances of the offense are vile and egregious. We acknowledge that case law is clear that, while the circumstances of the case and the need for deterrence may be considered as two of many factors, they cannot be given controlling weight unless they are of such overwhelming significance that they necessarily outweigh all other factors. *State v. Markham*, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988). In this case, we believe that they do. The defendant, an adult, contacted a person whom he believed to be a thirteen-year-old girl and engaged in completely inappropriate dialogue and acts through the computer, including sending photographs of his genitals and live video of himself masturbating. He planned a meeting with the "victim," even suggesting that they leave the county so as not to be seen by the "victim's" mother

or friends. We have only the defendant's self-serving statement, which the trial court found not credible, that he did not intend to actually meet the "victim" and commit "an actual act."

As did the trial court, we further conclude that the need for deterrence in this case is great. The State notes in its brief that a trial court may take "judicial notice of some facts necessary to establish a need for deterrence, particularly in the area of publicity." *State v. Hooper*, 29 S.W.3d 1, 13 (Tenn. 2000). There was reference made in this case to the scope of camera coverage which was to be allowed, indicating significant media interest. Moreover, with the rise of the use of the internet in our society and the easy access it provides to children, the need for deterrence is critical, as evidenced by the creation of a task force to deal with these types of specific crimes. Based upon these factors, we find the denial of judicial diversion appropriate in this case.

## **II. Denial of Probation**

Next, the defendant contends that the trial court erred in denying him probation and in finding that the specific crime for which the defendant was convicted "should not be probatable." When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401(d), Sentencing Comm'n Cmts.

In this case, the defendant is eligible for an alternative sentence because his sentences were ten years or less and the offenses for which he was convicted are not specifically excluded by statute. T.C.A. §§ 40-35-102(6), -303(a)(2006). However, the 2005 sentencing amendment to the sentencing act, which apply to the defendant's case as his crimes occurred after the June 7, 2005 enactment, deleted the sentencing provision granting a defendant a presumptive entitlement to an alternative sentence. Under the 2005 amendment, a Range I offender "should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." See T.C.A. § 40-35-102(6). Evidence to the contrary may be established by showing that: (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. *Ashby*, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). The trial court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential

or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); *Boston*, 938 S.W.2d at 438.

However, the defendant is required to establish his “suitability for full probation.” *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); T.C.A. § 40-35-303(b) (2006). A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (Tenn.1956), *overruled on other ground by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000)). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant’s criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

In denying probation in this case, the trial court made the following findings:

Whether [the sentence] should be probated or not is a whole other question and the Court goes back to its original finding. Sir, it should not be probated. I think to probate this offense, to give you three [years] probation, would unduly depreciate the seriousness of the act that you committed. I think it sends the wrong message. I think it says that a person can make a mistake such as this, and be given every courtesy of the Court. And, quite frankly, that’s just not true here.

Once again, and I don’t mean to belabor the point and please forgive me, but the fact is, is that you looked at the pictures of a 13-year-old child and you purposely exerted power over that child in an effort to take something that is most precious to her away. And the Court simply does not believe that to be a probatable offense.

Likewise, I believe that probation should not be considered in this case because confinement is necessary to dissuade others from committing the same offense. This has become a problem in our community. The community has no other way of dealing with this problem successfully other than to remove the problem from polite society. And even if that’s for a relatively minor time, according to your range of punishment, the fact is [ ] that this Court is obligated to do so. And the Court needs to send a message clear that if you engage in this type of activity, you face the realistic and probable threat of going to prison, that the Court may be sympathetic to you as a person, may be sympathetic to whatever mental health issues caused you to commit the crime, may be sympathetic to the family that you have lost, but regardless of the sympathies of the Court, the message has to be sent that if you commit the crime, you are going to do the time. This is a horrendous crime and I’ve made that clear. It should not be probatable in your case or, quite frankly, any others and that is the message that needs to be sent.

We must agree with the defendant that the trial court again made inappropriate comments regarding his belief that the offense for which the defendant was convicted should not have been a probatable offense. It is the legislature's province to determine which crimes are to be excluded from consideration for probation, and they chose not to do so with this crime. "Once the legislature has specifically authorized the use of sentencing alternatives to confinement for a particular offense, trial courts may not summarily impose a different standard by which probation is denied solely because of the defendant's guilt for that offense." *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). Thus, the trial court was to consider the defendant, as an individual, to determine whether probation should be granted. Accordingly, we must conduct a *de novo* review of the record to determine if probation is appropriate on the facts of the case.

A trial court may deny probation on the basis of the circumstances of the offense alone if those circumstances could be described as especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree and when the nature and circumstances of the offense are such that they outweigh all other factors favoring probation. *Hartley*, 818 S.W.2d at 374. The same positive factors enumerated in our review of the defendant's suitability for judicial diversion also weigh in favor of a grant of probation, those being the defendant's lack of criminal history, his favorable social history, and the indication that he would be amenable to correction. He has previously shown that he can be successful in a rehabilitation setting in his struggle with drug and alcohol addiction. The defendant readily admitted his prior behavior to the court and indicated remorse for his actions. Nonetheless, we must conclude that the circumstances of the offense, as previously indicated, are simply reprehensible. However, after weighing these factors, we are unable to agree with the trial court that a sentence of total incarceration is warranted. That being said, we are also unable to conclude that the defendant has carried his burden of establishing his suitability for total probation and that such a sentence would "subserve the ends of justice and the best interest of both the public and the defendant." Some incarceration is warranted based upon the facts of the case. Accordingly, we modify the sentence to reflect service of six months incarceration, with the remainder to be served on supervised probation.

## CONCLUSION

Based upon the foregoing, the trial court's denial of judicial diversion is affirmed. The denial of probation is reversed, and the sentence is modified to one of split confinement with six months to be served in incarceration and the balance to be served on supervised probation.

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JOHN EVERETT WILLIAMS, JUDGE